No.

In The

# Supreme Court of the United States

October Term, 1993

CHARLES GILBERT and JENNINGS GILBERT,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether a rational trier of fact could have convicted the petitioners under 21 U.S.C. § 841(a)(1) where the petitioners were in proximity to the marijuana, but not in the manufacture or possession of the marijuana, and where intent to distribute and manufacture were not sufficiently shown by the United States.

## LIST OF PARTIES

The parties in the proceedings below were the petitioners, Charles Gilbert and Jennings Gilbert, and the United States of America.

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No.

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October Term, 1993

CHARLES GILBERT and JENNINGS GILBERT,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

The petitioners, Charles Gilbert and Jennings Gilbert, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above titled proceeding, May 18, 1993, and finalized by a denial of a petition for rehearing en banc, July 15, 1993.

## OPINION BELOW

On March 13, 1992 a final judgment was entered against the petitioners, Charles Gilbert and Jennings Gilbert in the United States District Court for the Eastern District of Kentucky, at

London, Ky. The decision of the District Court was not published, but a copy is attached as Appendix "A", p. 1a, *infra*. On May 18, 1993 the Court of Appeals entered its Opinion sustaining the jury verdicts of the United States District Court for the Eastern District of Kentucky on four counts: conspiracy to manufacture and possess marijuana in violation of 21 U.S.C. § 846; manufacture of 810 marijuana plants and abetting the same, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2(a) & (b); possession with intent to distribute 810 marijuana plants and aiding and abetting the same, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2(a) & (b), and possession with intent to distribute sixty (60) pounds of marijuana, in violation of 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2(a) & (b). A copy of the May 18, 1993 opinion, which is not reported, is attached as Appendix "B", p. 3a, *infra*. Following a petition for rehearing en banc, the court entered an order denying the petition on July 15, 1993. A copy of the order is attached as Appendix "C", p.7a, *infra*.

## STATEMENT OF JURISDICTION

On May 18, 1993 the Court of Appeals for the Sixth Circuit entered its opinion affirming the petitioners' District Court convictions. On July 15, 1993 the Court of Appeals for the Sixth Circuit entered an order denying the petitioners' petition for rehearing en banc (App.C). Jurisdiction of this court is invoked under Title 28, United States Code § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:
No person shall . . . be deprived of life, liberty, or property without due process of law;. . . .

Title 21, United States Code, § 841 (a)(1):

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance .
> . . .

## STATEMENT OF THE CASE

The petitioners, Charles Gilbert and Jennings Gilbert, were indicted under the following statutory provisions: 21 U.S.C. § 846, conspiracy to manufacture and possession with intent to distribute marijuana (Count 1); 21 U.S.C. § 841(a)(1), manufacture of marijuana (Count II) and 18 U.S.C. § (2)(a)(b), aiding and abetting (Counts III and IV). The petitioners were tried and convicted in the United States District Court for the Eastern District of Kentucky on all four counts.

The indictment stems from an arrest made while both Charles and Jennings Gilbert were squirrel hunting during the early morning hours of September 10, 1990. The father and son, along with a family friend, Aulden Burns, were on their first hunt of the season. Jennings, Charles Gilbert's son, had agreed to go along on the hunt because of his concern for his father's health, and fear that his father might hurt himself in the woods (Jennings Gilbert at TR, Vol. IV, p. 91).

Unknowingly, the Gilberts and Aulden Burns were about to step into a trap set by law enforcement officers of the United States Forest Service, the National Guard, the Kentucky Attorney General's office and the Kentucky State Police who had been waiting in the area for several days after a large patch of marijuana had been located by aerial reconnaissance. The marijuana patch

was in a remote area adjacent to a rock cliff, under which was a drying area.

After the three hunters had entered the cliff area and shot one squirrel, they heard noises in the adjacent area and also below in the cliff area. Jennings went in to investigate, leaving the two elder men behind. When Jennings had returned, about 45 minutes later, the group left their guns and squirrel on high and headed in the direction of the muffled thud they had heard below. They then found that they had stumbled onto a drying area for marijuana. While they stood in the area and pondered their discovery for 3 to 5 minutes they found themselves forced to the ground, handcuffed and under arrest.

In their appeal to the Sixth Circuit, the Gilberts argued that the government had failed to sufficently prove the elements of 21 U.S.C. § 841(a)(1) as to their possession, intent to manufacture and distribute the marijuana in question. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the United States District Court for the Eastern District of Kentucky finding no error warranting a reversal (App. B, p.4, *infra*).

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT WAS IN ERROR SINCE A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE ESSENTIAL ELEMENTS OF THE OFFENSE WERE NOT MET BEYOND A REASONABLE DOUBT.

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) the court set out a test for distinguishing two offenses within the same statute for purposes of separate punishment. The *Blockburger* test is:

> Whether the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine *whether there are two offenses or only one* is whether each provision requires *proof of an additional fact which the other does not.*

*Id.* at 304, S.Ct. at 182. (Emphasis added).

Pursuant to the *Blockburger* test, courts have construed the marijuana statute at bar, 21 U.S.C. § 841(a)(1), to meet the test announced there and to describe two separate offenses, each of which has an additional fact which the other does not, and therefore to permit multiple or separate punishments for these separate acts without violating the constitutional protection against double jeopardy. Constitution of the United States, Amendment 5.

A more recent case applying the *Blockburger* test to the statute in question, 21 U.S.C. 841(a)(1), is *United States v. Miller*, 870 F.2d 1067 (6th Cir. 1989). *Miller* updates the test as:

> The offense of possession with intent to distribute undoubtedly can be proved without any proof of manufacture of that substance. Furthermore, the offense of manufacturing, while likely involving proof of possession, does not require any proof regarding an intent to distribute the substance.

*Id.* at 1071.

The petitioners argue that the evidence in this case can establish neither their intent "to manufacture, distribute or dispense" nor the second crime under 21 U.S.C. § 841(a)(1), to "possess with intent to manufacture, distribute, or dispense" the marijuana that was the subject matter of their arrest.

## II.

## THE GOVERNMENT FAILED TO PROVE INTENT TO MANUFACTURE THE MARIJUANA IN QUESTION BEYOND A REASONABLE DOUBT.

As to both Gilberts in general, no proof whatsoever has been offered to establish that either Charles or Jennings Gilbert was involved in the manufacture of the marijuana patch into which they stumbled while on a squirrel hunting trip. The Government failed to show that the Gilberts had any previous knowledge of the existence of the patch. They carried with them no fertilizer, and no cultivation implements such as hoes or other weeding equipment.

As to Charles Gilbert specifically, he was never seen or identified as being in the marijuana patch. All officers testifying at the trial level stated that he was seen only on the high ridge where the hunters entered the stake out area and the drying area below. The manufacture prong of the statute is tied to the patch while the

possession prong is founded in the drying area where the product would be prepared for marketing and distribution. Therefore, Charles Gilbert could not be seen as manufacturing the marijuana, since he was never in the patch. Charles Gilberts' location throughout the day is consistent with the statement of Wayne Turner, a captain in the Kentucky Army National Guard and a team leader on the surveillance team in this case identified Charles Gilbert merely as being present, simply following his son down the patch from the upper ridge, without any suggestion of activity on his part with respect to the marijuana in the drying area (Wayne Turner at TR, Vol. II, p. 88). Charles Gilbert is 64 years old and in bad health. He has heart and lung problems and as a result draws disability payments due to these impairments [Charles Gilbert at TR, Vol. IV, p. 28, pp. 31-32]. Because of his ailments it would be virtually impossible for him to maintain, or assist in maintaining the cultivation of a marijuana patch. Also, following his arrest he granted permission for his trailer to be searched. Absolutely no evidence of marijuana cultivation or possession was found (Charles Gilbert at TR, Vol. IV, p. 28, pp. 64-65). Finally, in his direct testimony, Charles Gilbert made a stout denial that the marijuana patch he was caught in was his (Charles Gilbert at TR, Vol. IV, p. 66). Therefore, it was clear error for the Court of Appeals for the Sixth Circuit to convict Charles Gilbert of the manufacture prong of the criminal statute. He was never present in the patch where manufacture occurred and no one's testimony even came close to placing him there.

As to Jennings Gilbert specifically, he was the only one of the three hunters, although not clearly or consistently, identified as having been located in the marijuana patch. His mere presence was insufficient to establish the act or intent to manufacture the marijuana crop the group had happened upon. He was without cultivation implements of any kind, and he was not weeding or applying fertilizer. A man was seen in the patch "breaking or cutting" buds from the plants (Captain John Conti at TR, Vol. II, p.

27). Another individual, Robert Schaefer, thought that someone was breaking or cutting marijuana buds, although his statement was equivocal: "Breaking or sometimes — it seemed like he was breaking, sometimes he pulled a knife out and used that." (Robert Schaefer at TR, Vol. II, p. 76).

Even if it had been proven that Jennings Gilbert was in fact the man in the patch, which he was not, his act of breaking or cutting buds from the plants is wholly insufficient to meet the Government's burden of proof beyond a reasonable doubt that he was engaged in the manufacture of marijuana. Other plausible inferences could have been drawn from his alleged conduct. The most obvious is that he could have been stealing it for his own use. The law enforcement officers simply "assumed" that he was harvesting marijuana that he had manufactured and cultivated rather than taking someone else's crop. One last inference that can be made is that it was a disastrous coincidence. Jennings just happened to stumble into a marijuana patch while squirrel hunting. It is uncontested that the three men had rifles and shotguns appropriate for squirrel hunting and that in fact they had shot one squirrel prior to coming upon the stake out area. The District Court Judge dismissed Count V of the indictment, a charge of using and carrying firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), for just this same reason. These men had weapons commonly used in squirrel hunting, not protecting a marijuana patch.

## III.

## THE GOVERNMENT FAILED TO PROVE POSSESSION WITH INTENT TO DISTRIBUTE BEYOND A REASONABLE DOUBT.

The evidence presented by the Government failed to establish any possession by the Gilberts with intent to distribute. The only evidence provided by the Government of possession, was the mere presence of Charles and Jennings Gilbert in the drying area. Jennings testified to finding the marijuana hanging on wires and admitted "that we may have handled some of it, just looking at it, but we did not take any of that marijuana off the wire." (Jennings Gilbert at TR, Vol. IV, p. 90). Despite this conflict in testimony, one fact is uncontested: neither Jennings nor Charles attempted to transport or remove the "harvested" marijuana outside the drying area.

The team members attempted to photograph the activities of the Gilberts who were in the drying area for three to five minutes prior to their arrest but, due to the failure of their 35-millimeter camera, one of the few with film, the pictures allegedly taken did not turn out (Wayne Turner at TR, Vol. II, p. 91). Based on the activity or *inactivity* of the Gilberts in the drying area, the law enforcement officials decided to arrest the three men present in the area. The arrest was made based on their mere physical presence in the cliff area alone without waiting to see if they indeed would harvest, and pack up the dried marijuana and prepare to take it back to their waiting pick-up truck. The three to five minutes of conversation by the three men while in the drying area served as the basis for their arrest in lieu of activity involving marijuana that may have been proof of possession with intent to distribute under the statute with which they were charged. They did not give them time to test their intent before moving in to make the arrest. The petitioners submit that their short period of indecisive activity

while in the drying area is insufficient evidence to support proof beyond a reasonable doubt of possession "with intent to manufacture, distribute, or dispense" marijuana. *21 U.S.C. § 841(a)(1).*

## IV.

## MERE PROXIMITY TO MARIJUANA OR AN AREA WHERE MARIJUANA IS CULTIVATED IS INSUFFICIENT TO ESTABLISH INTENT TO MANUFACTURE OR POSSESS.

A case directly on point on the issue in question is a Sixth Circuit case arising from the same prosecution team. The case of *United States v. White,* 932 F.2d 588 (6th Cir. 1991), decided only seven months prior to the trial of these petitioners, also involved prosecution under 21 U.S.C. 841(a)(1). In *White*, the defendant lived in a trailer located only three feet from a marijuana patch in Perry County, Kentucky. The patch showed clear evidence of cultivation due to the presence of support wires and evidence of fertilizer in the soil.

Under the statute in question, either actual or constructive possession will sustain a conviction. Constructive possession requires a showing of "ownership, dominion, or control" over the suspect substance or the area in which it is found. *United States v. Gordon*, 700 F.2d 215, 217 (5th Cir. 1983). In *Gordon*, the court reversed the conviction of a passenger in a truck containing 60 pounds of marijuana, holding that mere presence was insufficient to establish intent to distribute. In essence, the court held that *presence or proximity does not create a presumption of intent* to possess or distribute. *Id.* at 217. The Government still must meet its burden of proof beyond a reasonable doubt without the benefit of a presumption to help establish that intent.

Strong circumstantial evidence linked the defendant to the marijuana — including the physical distance of three feet from the trailer to the patch and the presence of fertilizer and buckets inside the defendant's trailer. Nonetheless, the court held that

> the only evidence linking White to the marijuana was the fact that he lived three feet from the patch. The actual cultivator of the field was unknown. Moreover, although fertilizer and buckets were found in White's trailer, the fertilizer in White's trailer and the fertilizer in the patch were never compared.

*White* at 589.

*White* cites an earlier Sixth Circuit case with approval and as authority for construing the statutory intent to distribute involved in the present case and holds that mere knowledge cannot be equated with intent to distribute:

> The "intent to distribute" is an essential element of 841(a)(1) .... 21 U.S.C. 841(a)(1) requires both general criminal intent and the specific "intent to distribute" before a violation is proven .... [Section 841(a)(1)] "is violated only if possession is accompanied both by knowledge of the nature of the act and also by the intent to manufacture, distribute, or dispense."

*United States v. Pope*, 561 F.2d 663, 670 (6th Cir. 1977).

Applying the *Pope* test, the *White* Court rejected the Government's position as showing only knowledge but no intent. In language critical to our case, the *White* court examined the

accumulation of circumstantial evidence linking the defendant to the marijuana:

> This is not a case, however, in which circumstantial evidence exists which would permit us to affirm the jury verdict. . . . *However, a line must be drawn between valid circumstantial evidence, and evidence which requires a leap of faith in order to support a conviction.* In this case, there is simply no evidence which supports an inference of possession or intent to manufacture or distribute marijuana. Thus, we find that no rational trier of fact would have concluded that White possessed marijuana with intent to distribute. White's conviction is REVERSED.

*White* at 590. (Emphasis added).

Our case is factually analogous to the *White* case. The petitioners argue that the *White* test should govern in their case to cause a similar reversal of their conviction. In *White*, no testing was done to determine whether the fertilizer in the ground in the marijuana patch was the same as the fertilizer found in the defendant's trailer. You can compare these facts to our case in that in our case there was copper wire used for hanging the marijuana in the drying area and copper wire found in the petitioner's truck, yet no comparison was made of the two wires to determine if they were the same. In any comparison, the circumstantial evidence in *White* was even stronger than that in our case. The petitioners were found near a patch in an inaccessible area over 30 minutes away from Charles Gilbert's home and two hours away from Jennings Gilbert's home. In *White*, the defendant's trailer was only three feet from the marijuana patch in question.

For these reasons, the Sixth Circuit Court of Appeals erred in failing to decide this case in conformity with their recent decision in *White*. As in *White*, the circumstantial evidence in our case is not valid and would require a "leap of faith" in order to convict the petitioners.

## CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 15, 1993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-5425/5426

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES GILBERT; JENNINGS GILBERT,

Defendants-Appellants.

ORDER

BEFORE: KEITH and BATHCHELDER, Circuit Judges; and TAYLOR,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Anna Diggs Taylor sitting by designation from the Eastern District of Michigan

*Appendix A*

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

## APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 18, 1993

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

92-5425/5426

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES GILBERT and JENNINGS GILBERT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: KEITH and BATCHELDER, Circuit Judges; and TAYLOR, District Judge.*

PER CURIAM: Defendants-Appellants, Charles Gilbert and Jennings Gilbert (collectively "the Gilberts") appeal their jury verdicts on four counts: 1) conspiracy to manufacture and possess marijuana in violation of 21 U.S.C. § 846; 2) manufacture of 810 marijuana plants and abetting the same, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2 (a) & (b); 3) possession with intent to distribute 810 marijuana plants and aiding and abetting the same,

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* The Honorable Anna Diggs Taylor, United States District Judge for the Eastern District of Michigan, sitting by designation.

in violation of 21 U.S.C. § 841 (a) (1) and 18 U.S.C. § 2 (a) & (b), and 4) possession with intent to distribute sixty (60) pounds of marijuana, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (a) & (b). We AFFIRM.

I.

In August of 1990, Officer Michael Gay, while conducting aerial surveillance for the United States Forest Service, located several suspected marijuana plots with the boundaries of the Daniel Boone National Forest. During the surveillance, Officer Gay also observed a nearby drying area for harvested marijuana. On September 4, 1990, the officers again flew over the area and discovered freshly cut marijuana plants hanging in the drying area on copper wire. With this information on September 7, 1990, a team of officers from the United States Forest Service, the Kentucky State Police, the Kentucky Attorney General's Office and the National Guard positioned themselves to conduct a ground surveillance of the area.

During the first two days of the operation, the officers observed no activity. On the third day, the officers observed a man enter one of the marijuana patches for approximately forty-five minutes and remove some of the marijuana "buds" and place them in plastic garbage bags. Officers testified that this man was not alone because they heard at least two men conversing. The officers further testified that the clothing, hair color and hairstyle of the man they observed was similar to that of Jennings Gilbert. None of the officers, however, could identify the other individuals that were in the marijuana patch.

Another team of officers was stationed in the drying area where harvested marijuana was in process of drying. Shortly after

the first team observed the man harvesting in the patch, this second group of officers heard noises on the rock cliff above the area. They then heard a loud crashing noise when two garbage bags of marijuana were thrown down the face of the cliff into the area. These officers observed a man, later identified as Jennings Gilbert, proceed down the path towards the drying area. Jennings Gilbert's father, Charles, and a third elderly individual, Aulden Burns, followed him down the path.

The officers testified that they observed the Gilberts talking while Jennings collected the dried marijuana from the copper wire and placed it in an empty garbage bag. The officers then arrested each individual, secured the area, and seized two garbage bags with filled with freshly cut marijuana and one bag that contained dried marijuana plants. Pocket knives that contained marijuana residue were also seized from the Gilberts. Following his arrest, Charles Gilbert stated that he would have to admit to the marijuana that was there, since he had been caught with it.

During a sweep of the area, the officers found two shotguns, a rifle, and other hunting paraphernalia. They located a box of plastic garbage bags and a back pack that contained scissors with traces of marijuana residue. The officers located the Gilbert's vehicle some distance away which contained a spool of cooper wire and another box of plastic garbage bags.

The trial proceedings commenced on December 2, 1991.[1] The Gilberts' both testified at trial, however, that they were in the Daniel Boone National Forest to hung squirrels and stumbled upon the marijuana patch. They claimed that they did not plant the marijuana that they picked or intend to distribute the marijuana.

---

1. On December 2, 1991, the district court severed Aulden Burns from the trial proceedings for the Gilberts because of continuing health problems.

*Appendix B*

Following a trial, the jury returned a guilty verdict for the Gilberts on all of the counts that were submitted.[2] The district court sentenced Jennings Gilbert to concurrent sentences of seventy-eight (78) months on Counts 1, 2, and 3 and sixty (60) months imprisonment on Counts 4. Charles Gilbert was sentenced to sixty (60) months imprisonment for his role in the conspiracy.

II.

On appeal, the Gilberts argue that the evidence presented was not sufficient to convict them of the crimes charged, that the government failed to sufficiently identify them, and that the government's equipment failure during the surveillance operation called into question the credibility of the evidence presented.

We assess a sufficiency of the evidence challenge by viewing the evidence presented in the light most favorable to the government and determining whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See United States v. Kottmeyer,* 961 F.2d 569, 573 (6th Cir. 1992). Having carefully considered the record and the issues presented in the appellate briefs and at oral argument, we find no error warranting reversal. Therefore, we AFFIRM the jury convictions and the sentences imposed by the Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky.

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2. The district court granted the Gilberts' motion for judgment of acquittal as to Count 5 of the indictment which charged the use and carrying of firearms during and in relation to the drug trafficking crimes listed in Counts 1 through 4, in violation of 18 U.S.C. § 924(c). The district court found that the weapons at issue were not the type of weapons contemplated by Congress when it enacted that statute.

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY FILED MARCH 12, 1992

UNITED STATES DISTRICT COURT
EASTERN District of KENTUCKY
LONDON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: 91-11

Warren Scoville and Sara Combs
Defendant's Attorney

UNITED STATES OF AMERICA

V.

CHARLES GILBERT
(Name of Defendant)

THE DEFENDANT:
was found guilty on count(s) *ONE, TWO, THREE AND FOUR* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: *21:846*
Nature of Offense: *Conspire to manufacture, and possess with intent to distribute a Schedule I controlled substance (Marijuana)*
Date Offense Concluded: *09/10/90*
Count Number(s): *One*

*Appendix C*

Title & Section: *21:841(a)(1) & 18:2(a) & (b)*
Nature of Offense: *Manufacture a Schedule I controlled substance (Marijuana) & aid & abet*
Date Offense Concluded: *09/10/90*
Count Number(s): *Two*

Title & Section: *21:841(a)(1) & 18:2(a) & (b)*
Nature of Offense: *Possess a Schedule I controlled sub. (marijuana) with intent to distribute and aid and abet same*
Date Offense Concluded: *09/10/90*
Count Number(s): *Three & Four*

The defendant is sentenced as provided in pages 2 through *4* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) *FIVE* and is discharged as to such count(s).

It is ordered that the defendant shall pay a special assessment of $*200.00*, for count(s) *One, Two, Three & Four*, which shall be due as follows: *before release from custody.*

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *401-30-3111*

Defendant's Date of Birth: *12-14-27*

*Appendix C*

Defendant's Mailing Address:
P.O. Box 54
*Oneida, KY 40972*

Defendant's Residence Address:
*Same*

*March 6, 1992*
Date of Imposition of Sentence

*HENRY R. WILHOIT, JR., JUDGE*
Name & Title of Judicial Officer

*March , 1992*
Date

*Appendix C*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *SIXTY (60) MONTHS*

The court makes the following recommendations to the Bureau of Prisons:

*That the defendant serve his sentence at the Federal Correctional Institution in Manchester, Kentucky.*

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

before 2 p.m. on *July 15, 1992.*

*Appendix C*

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *FOUR (4) YEARS*

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prison.

The defendant shall not possess a firearm or destructive device.

* * *

*Appendix C*

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): *Paragraph 34 — The number of plants is 105. The base offense level is 26.*

Guideline Range Determined by the Court:

Total Offense Level: *28*

Criminal History Category: *I*

Imprisonment Range: *78* to *97* months

Supervised Release Range: *4* to *5* years

Fine Range: $*12,500.00* to $*2,000,000.00*

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitituion: $ *N/A*

The sentence departs from the guideline range
for the following reason(s):
*Section 5H1.1 - Age and Infirmity*

## APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY IN *UNITED STATES OF AMERICA V. JENNINGS GILBERT* FILED MARCH 12, 1992

UNITED STATES DISTRICT COURT
EASTERN District of KENTUCKY
LONDON

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: 91-11

Warren Scoville and Sara Combs
Defendant's Attorney

UNITED STATES OF AMERICA

V.

JENNINGS GILBERT
(Name of Defendant)

THE DEFENDANT:
was found guilty on count(s) *ONE, TWO, THREE AND FOUR* after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section: *21:846*
Nature of Offense: *Conspire to manufacture, and possess with intent to distribute a Schedule I controlled substance (Marijuana)*
Date Offense Concluded: *09/10/90*
Count Number(s): *One*

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Title & Section: *21:841(a)(1) & 18:2(a) & (b)*
Nature of Offense: *Manufacture a Schedule I controlled substance (Marijuana) & aid & abet*
Date Offense Concluded: *09/10/90*
Count Number(s): *Two*

Title & Section: *21:841(a)(1) & 18:2(a) & (b)*
Nature of Offense: *Possess a Schedule I controlled sub. (marijuana) with intent to distribute and aid and abet same*
Date Offense Concluded: *09/10/90*
Count Number(s): *Three & Four*

The defendant is sentenced as provided in pages 2 through *4* of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) *FIVE* and is discharged as to such count(s).

It is ordered that the defendant shall pay a special assessment of $*200.00*, for count(s) *One, Two, Three & Four*, which shall be due as follows: *before release from custody.*

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: *403-72-8694*

Defendant's Date of Birth: *07-01-50*

*Appendix D*

Defendant's Mailing Address:
*1613 Wilo Rd.*
*Somerset, KY 42501*

Defendant's Residence Address:
*Same*

*March 6, 1992*
Date of Imposition of Sentence

*s/ illegible*
Signature of Judicial Officer

*HENRY R. WILHOIT, JR., JUDGE*
Name & Title of Judicial Officer

*March , 1992*
Date

*Appendix D*

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of *SEVENTY EIGHT (78) MONTHS on each of Counts 1, 2, and 3 to run concurrently. SIXTY (60) MONTHS on Count 4 to run concurrently with the sentence imposed on Counts 1, 2, and 3.*

The court makes the following recommendations to the Bureau of Prisons:

*That the defendant serve his sentence at the Federal Correctional Institution in Manchester, Kentucky.*

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

before 2 p.m. on *July 15, 1992.*

*Appendix D*

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of *FOUR (4) YEARS*

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prison.

The defendant shall not possess a firearm or destructive device.

* * *

*Appendix D*

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): *Paragraph 34 — The number of plants is 105. The base offense level is 26.*

Guideline Range Determined by the Court:

Total Offense Level: *28*

Criminal History Category: *I*

Imprisonment Range: *78* to *97* months

Supervised Release Range: *4* to *5* years

Fine Range: $*12,500.00* to $*2,000,000.00*

Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitituion: $ *N/A*

The sentence departs from the guideline range
for the following reason(s):